80-1739
No.

Office-Supreme Court, U.
FILED
APR 17 1981
ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DANIEL RAY STELLY,
Plaintiff-Petitioner,

versus

ATLANTIC PACIFIC MARINE CORP.,
Defendant-Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

PETITION FOR CERTIORARI

RICHARD J. PUTNAM, JR.
P.O. Drawer 459
Abbeville, Louisiana 70510
(318) 893-0076
Attorney of Record for Petitioner

Of Counsel:

WILLIAM J. BURRIS
P.O. Box 2105
Lafayette, Louisiana 70502
Telephone: (318) 232-6151

SCOFIELDS' QUALITY PRINTERS, INC., P.O. BOX 53096, N.O., LA. 70153 - 504/822-1611

QUESTIONS PRESENTED FOR REVIEW

I. Did the trial judge err, with prejudice to plaintiff, in limiting the number of medical experts plaintiff could call to one orthopedic surgeon who had examined plaintiff and to one other orthopedic surgeon who was not allowed to examine plaintiff but was limited to formulating his opinion upon consideration of medical reports and x-rays. Plaintiff, absent this ruling under Federal Rules of Evidence Rule 403, would have called three orthopedic surgeons who had examined plaintiff and would have all testified that:

1) Plaintiff was totally and permanently disabled, and

2) That his spondylolysis, though probably congenital, was aggravated by trauma.

The witnesses were greatly needed because the chief defense medical witness was the treating physician whose opinion was that the plaintiff had completely recovered from his injury. The fact that he was the treating physician gave undue verisimilitude to his claim that the condition could not be aggravated by trauma.

II. The trial court's ruling effectively chilled and infringed upon plaintiff's right to a meaningful trial by jury under the guarantee to a jury trial under the Jones Act 46 USCA 688.

LIST OF ALL PARTIES

I. Daniel Ray Stelly, Plaintiff-Appellant

II. William J. Burris
Attorney at Law
Post Office Box 2105
Lafayette, Louisiana 70502
Attorney for Plaintiff-Appellant

III. Richard J. Putnam, Jr.
Attorney at Law
Post Office Drawer 459
Abbeville, Louisiana 70510
Attorney for Plaintiff-Appellant

IV. Darrell J. Hartman
Attorney at Law
Post Office Box J
Kaplan, Louisiana 70548
Attorney for Plaintiff-Appellant

V. Atlantic Pacific Marine Corporation,
Defendant-Appellee

VI. American Home Assurance Corporation,
Insurer for Defendant-Appellee

VIII. Patrick A. Juneau, Jr.
Attorney at Law
Voorhies & Labbe
Post Office Box 3527
Lafayette, Louisiana 70502
Counsel for Defendant-Appellee and its insurer.

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REPORT OF OPINIONS OF LOWER COURTS

The reasons for the ruling limiting testimony by the Honorable District Judge Eugene Davis appears in the transcript at page 544.

The Judgment of Honorable District Judge John Shaw in the amount of $27,000 in accordance with the jury verdict is unreported and dated November 30, 1980.

The Judgment of the United States Court of Appeals, Fifth Circuit, Unit A, in Docket Number 80-3016, dated January 30, 1981, is unreported and affirmed the District Court's action under Rule 21.

GROUNDS OF JURISDICTION

1. a) The ruling made by the Honorable District Judge W. Eugene Davis made at the pre-trial hearing held on October 11, 1979, is the ruling to be reviewed. This ruling is reflected by the Minute Entry of December 13, 1979. (Page 544 of Transcript)

   b) The judgment of the Honorable Fifth Circuit Court of Appeals dated January 20, 1981 affirming the above set forth ruling.

2. This matter was within the admiralty jurisdiction of the United States Courts conferred in the United States Constitution Article III, Section 2. Plaintiff may seek writs of certiorari under 28 USC 2101.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN CASE

A. The Jones Act (46 USCA 688) reads as follows:

Recovery for injury to or death of seaman

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

should avoid heavy laboring type work. . . . *We submit to you that the evidence will prove that the best person to evaluate that is someone who examines and treats a person on a regular permanent basis as was the position of Dr. Leonard.* . . . I ask you, if you will, to be very attentative to the medical testimony, because that's not the lawyers talking. That's the people who actually examined and *treated* this individual. (Emphasis Supplied)

Again defendant stressed the fact that Dr. Leonard was the treating physician in his cross-examination of Dr. Cobb (who was prohibited from seeing the plaintiff due to the pre-trial order):

"Q. *Dr. Cobb, you did not, as I understand it, examine this man at any time, did you?*

A. *Right. I never did see him.*

Q. Now Dr. Cobb, so far as what effect the 1976 instance would have had on this man, is it not also correct, Dr., *that a person or physician who would be in the best position to determine the effect of that accident had on his pre-existing condition would be the physician who was, in fact, his treating physician from an orthopedic standpoint, and who continued to treat him over a period of time?*

A. *Right.* Well, I think he would have a lot more first-hand information and clinical

B. Rule 403 of the Federal Rules of Evidence reads as follows:

> Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time
>
> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

C. Rule 16 of the Federal Rules of Civil Procedure reads as follows:

> Pre-Trial Procedure; Formulating Issues
>
> In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider
>
> 1) The simplification of the issues;
>
> 2) The necessity or desirability of amendments to the pleadings;
>
> 3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
>
> 4) The limitation of the number of expert witnesses;

5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pretrial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

STATEMENT OF THE CASE

This suit was filed on August 9, 1978, seeking damages for injuries received on June 1, 1976. The suit was brought under the Jones Act and under the admiralty jurisdiction claiming unseaworthiness of a vessel. On June 1, 1976, Daniel Ray Stelly was

employed by Atlantic Pacific Marine Corporation as a roughneck (member of a drilling crew) aboard an inland submersible drilling barge. He was in top physical condition and had never experienced any difficulty in his back. He had been an excellent oilfield worker and would have surely advanced in oilfield employment. On June 1, 1976, he was working as a roughneck when the driller on the rig engaged the wrong control and activated the rotary instead of the lead tong cathead line as intended. The activation of the rotary had the effect of putting the tremendous power of the drilling rig fully into the rotary, the string of pipe in the hole, and into the three hundred fifty (350) pound lead tongs which were latched onto the surface joint of the string, thus causing the whole assembly to turn clockwise. As a result, the three-fourth inch (¾") steel cable or "snub line" which normally would have prevented the clockwise movement of the tongs beyond a certain point, and which had a breaking strength of 42,000 pounds, was effortlessly snapped allowing the tongs to make a full clockwise rotation. As they swung around the shaft of the tongs, approximately three inches (3") in width and travelling at approximately seventy-eight (78) miles per hour hit Daniel Ray Stelly square in the lumbar area of his back. The force with which he was struck was translated as equivalent to that produced by a two thousand (2,000) pound automobile travelling at a speed of thirty (30) miles per hour. Mr. Stelly was standing when hit and was literally picked up and carried and dropped by the tongs landing approximately eight to ten feet from where he was standing when

he was hit. Mr. Stelly was immediately flown by helicopter to the nearest hospital, West Jefferson General in Marrero. He was x-rayed, observed overnight and released the next day for treatment by a physician in his hometown of Abbeville, Louisiana. He saw a general practitioner, Howard Alleman, who referred him to a physical therapist. He continued to have complaints of back pain and was referred to Dr. J. Lee Leonard, an orthopedic surgeon in Lafayette, Louisiana. Dr. Leonard was the treating physician of Mr. Stelly for one and a half years. He saw plaintiff a total of seven (7) times during his treatment.

On the first visit, Dr. Leonard diagnosed from x-rays that plaintiff had spondylolysis at L4. During Dr. Leonard's treatment of plaintiff, he continued to advise the plaintiff to return to work. The plaintiff continued to have worsening back pain. Finally, in March of 1978, the plaintiff was referred to Dr. Stuart I. Phillips, an orthopedic surgeon in New Orleans, Louisiana, the senior associate of Dr. Irving Cahen, former head of the Department of Orthopedics at Louisiana State University. Dr. Phillips examined Mr. Stelly on March 27, 1978, reviewed all x-rays, and all medical reports and concluded that Mr. Stelly's pre-existing spondylolysis had been aggravated by the trauma he had received and that because he was experiencing pain with activity and relief with rest almost two years after the injury, he should withdraw from manual labor or risk a spinal fusion within a short time. Due to such advice, Mr. Stelly

left his employment with Atlantic Pacific Marine Corporation. In October, 1978, Mr. Stelly was re-examined by Dr. Leonard for trial purposes at the request of defendant. Dr. Leonard, in essence reported that Mr. Stelly was not in any way disabled.

As trial approached, plaintiff realized the serious handicap inherent in having only one physician who saw him upon referral from his attorney and then on only one occasion as opposed to a "treating physician", particularly as these physicians were diametrically opposed in their opinion. Accordingly, counsel for plaintiff sought additional opinions from two other well qualified orthopedic surgeons, namely, Dr. John Cobb of Lafayette whom plaintiff would have been able to call at trial, and Dr. Henry LaRocca, an exceptionally well qualified orthopedic surgeon in New Orleans, Louisiana, who could have been deposed for trial purposes. Plaintiff had dealt with Dr. Cobb on prior occasions; he had never before met or communicated with Dr. Henry LaRocca but understood that his reputation was outstanding.

Plaintiff's intent to call these doctors was made known to the Court and to opposing counsel at the pre-trial conference held on October 11, 1979. There was absolutely no occasion or reason to make such known prior to that time. At that time, an appointment for examination of plaintiff had been set with Dr. Cobb and an appointment with Dr. LaRocca was being sought. Both doctors had, at the time of the pre-trial con-

ference, been furnished and had reviewed the hypothetical facts, all x-rays and medical reports.

At said conference, the Honorable Judge Eugene Davis instructed plaintiff that he would not be permitted to call any doctors other than Dr. Phillips, as this would give each side one orthopedic expert. Upon Plaintiff's vigorous urgings that Dr. Leonard was the "treating physician", that his testimony was suspect, that counsel did not believe that any other orthopedic surgeon would corroborate him, and that plaintiff would make himself available for examination at any time, the Court relented to the extent of permitting each side to call one additional doctor whose opinions were to be limited solely to a consideration of the records, x-rays, and hypothetical facts. The detailed recollection of counsel for plaintiff as to what occurred at the pre-trial conference is set forth in his affidavit at page 307 of the transcript.

The Court's statement is reflected in the minute entry made in response to plaintiff's Rule 10E motion which entry appears at page 544 of the record and reads as follows:

> "I acknowledge ruling at the pretrial conference on October 11, 1979, that plaintiff was limited to one additional medical witness who could give opinions based on existing medical records and reports. I have no practice

of limiting each side to one medical witness. The reasons for my ruling follow:

I understood that there was no significant dispute between the medical witnesses as to the nature of plaintiff's medical problem or the extent of his disability from this malady.

The controversy centered around whether trauma caused the condition.

Because the trial was set for November 5, 1979, I was dubious that enough time remained before trial for both plaintiff and defendant to secure examinations by orthopedic specialists. Since the plaintiff's physical condition was not in serious dispute, I permitted an additional witness on the question at issue, i.e. causation." (Emphasis Supplied)

There was no question at the time of this ruling that the only real issue in the lawsuit was the extent of plaintiff's disability. Dr. Leonard was taking the position that he had none and Dr. Phillips was taking the position that he was totally and permanently disabled from all manual labor. The medical reports in the possession of both sides at the time of the pre-trial conference leave no doubt as to this and appear at pages 468 and 481 of the record as attachments to Dr. LaRocca's post-trial affidavit.

The fact that the Court was informed of the central controversy as to disability is corroborated by the Defendant's contentions in the pre-trial stipulation filed after this pre-trial conference. The defendant's contentions appearing at page 108 of the record states "The respondent further contends that the plaintiff has recovered from the injuries he may have sustained as a result of the accident." Under Issues of Fact, number (e) on page 110 of the record, the party stated as an issue of fact, "(e) The nature and extent of injuries sustained by plaintiff." Plaintiff contends that the degree of disability was the crux of the controversy and that the Court was apparently mistaken "due to the fact that another issue was whether or not the spondylolysis could have been actually caused rather than merely aggravated by the trauma. This was still a viable question at the time of the pre-trial conference as there was a pre-trauma x-ray report (the x-ray film itself was unavailable) which did not reflect the spondylolysis break. Later testimony revealed that the break was probably there at the time of the injury and was only aggravated by the trauma. However, although causation was discussed and was a viable issue at the pre-trial conference, disability was the primary issue. In fact, under the Jones Act standard of causation, whether the break was caused or merely aggravated made no difference from a legal standpoint.

The Court was correct in understanding that a difference in opinion did exist as to whether the spondylolysis had been actually caused by the trauma or

simply aggravated by it. Perhaps the discussion of this issue led to the Court's understanding that only causation was in dispute. Actually, from a legal standpoint, it made no difference as to whether the defect was new or simply aggravated, and if that had been the only issue, the Court's ruling would have been correct. However, the extent of disability was the most important issue of the case, and the reason for seeking the opinions in testimony from Drs. Cobb and LaRocca was to counter the testimony of Dr. Leonard on that issue.

STATEMENT OF REASONS WHY WRITS SHOULD BE GRANTED

Writs should be granted due to the following reasons enumerated in Rule 17:

(1) The Court of Appeals for the Fifth Circuit in its decision "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

(2) The Court of Appeals for the Fifth Circuit "has decided an important question of law which has not been, but should be settled by this Court", to-wit, the extent which Rule 403 may be used by a trial court to restrict the number of witnesses whose testimony is both extremely probative and relevant without infringing upon a litigant's rights to a meaningful trial by jury under the Jones Act (46 USCA 688).

ARGUMENT

The Trial Court erred in limiting plaintiff's medical experts to one orthopedic surgeon who had examined plaintiff upon referral from his attorney and one additional orthopedic surgeon who was not allowed to examine plaintiff but was limited to his opinion based upon hypothetical facts, medical reports and x-rays, when plaintiff would, had the ruling not been made, called three orthopedic surgeons who had examined plaintiff and who would have agreed that plaintiff was totally and permanently disabled from heavy manual labor. The ruling was extremely prejudicial as the sole witness against plaintiff was his "treating physician" to whom he had been referred by a treating general practitioner, and who testified that plaintiff had completely recovered from his injury.

That the Trial Court's limitation was extremely prejudicial can be seen by considering:

a) The nature of the testimony which would have been produced absent the ruling;

b) Defendant's tactical play in opening statement, cross-examination of Dr. Cobb, and closing statement;

c) Considering the outcome of the case had Dr. Leonard been impeached or his testimony given little weight.

d) By considering the jury's extremely low verdict which had to be based upon acceptance of this defense doctor's testimony that there was no reason why plaintiff could not return to his occupation as an oilfield worker.

The Court's ruling and the circumstances surrounding it have been discussed fully above. The only basis for such a ruling in the Federal Rules of Evidence, although the Court did not mention it in his reasons for ruling, is believed to be in Rule 403 which reads as follows:

> Rule 403 — Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.
>
> All the relevant evidence may be excluded if its probative value is substantially outweighed by the danger of the unfair prejudice, confusion of the issue, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

In the case, by even the most liberal construction of Article 403, plaintiff should not have been limited in his production of medical evidence. In this case, *the* crucial issue was total and permanent disability versus no disability at all. One orthopedic surgeon was saying that the plaintiff should go back to work and the other was

saying that he would endanger his health and guarantee the necessity for a spinal fusion if he did return to work. If plaintiff had been allowed to introduce all of his evidence, he would have had three orthopedic surgeons of impeccable qualification who would have examined the plaintiff and all three would have opined that the plaintiff was totally and permanently disabled. In fact, Dr. LaRocca was characterized by Dr. Leonard himself as one of the most respected experts in this field (page 729). By the ruling of the Court, plaintiff was limited to one witness who had seen the plaintiff on one occasion (Dr. Phillips) and one witness who was prohibited by the Court from examining the plaintiff but who, from x-rays and medical reports, testified that he was of the opinion the plaintiff was totally and permanently disabled (Dr. Cobb). This put defendant in an extremely enhanced tactical position in that he had the treating physician who had followed the plaintiff for one and one-half years who had seen him a total of seven times,

Defendant's counsel took full advantage of this wrongfully enhanced tactical position. This is shown in the opening statement in which he made the following comments:

> The issue you will have to decide in this case is the nature and extent of the injuries and what is a reasonable compensation for these injuries. That is the sole issue we are here to confront you with. . . . His *treating physician,*

that is, Dr. Alleman, in Abbeville, Louisiana, referred him to Dr. Leonard, an orthopedic surgeon in Lafayette, who continued to *treat Mr. Stelly over an extensive period of time.* His testimony, again, will be on videotape. You can view for yourself what this doctor concluded, as his *treating orthopedic surgeon* and as referred to by the local doctor in Abbeville, as to what his opinion was. . . . And what happened was an accident occurred causing more or less a straining or aggravation type of injury of his back condition. The evidence, we submit to you, will show and this is mainly through his *treating orthopedic surgeon,* who would be the best person to give the testimony — is to the effect that whatever transitory or temporary effect that that injury would have had has long ceased to exist. And I think you will hear from the testimony that the *treating physician and the specialist, Dr. Leonard,* will conclude that this gentlemen was, as late as August — the accident would have been in June — was fully capable of returning to his previous type employment. . . . During the course of this, we will have some testimony from another orthopedic surgeon. The plaintiff in this case was referred to this surgeon in New Orleans by his counsel for an opinion. *And on the limited basis that he saw,* he found an aggravation of the injury, and because of this pre-existing defect, he concluded he might

examination. I was just speaking from a hypothetical standpoint about the underlying condition. *I think the examination would certainly have a bearing on one's opinion.*

Q. Now, so far as what a person such as this man can or cannot do at the present time, wouldn't that determination be best made by a physician, Dr., *who treated him over an extended period of time in the capacity of a treating physician?*

A. *Yes. I really don't know what this man's physical makeup is. I don't know how big he is, how strong he is.* We know he has a spondylo, and I think we can talk about that, in general, can aggravate spondylo, as far as the type of work. *But I don't think I can comment on this particular individual." (Emphasis Supplied)*

And I would once again point out to the Court that the reason this doctor did not know about this particular individual was because of the pre-trial order of the Judge.

Again, closing argument, the prejudicial effect of the Court's ruling can again be seen in the following comments by defendant's counsel:

"Dr. Alleman, after a short period of treatment of this man, referred him to an

orthopedic specialist. . . . He was referred to Dr. Leonard in Lafayette. *Dr. Leonard then became — and this is a fact — his treating physician.* At the referral of Dr. Alleman, and *treated him over a considerable length of time, no less than eight times.* His testimony was initially and consistently through the course of this treatment that he really did not demonstrate any significant problems with regard to his back. . . . His treatment continues. The man continues to be employed. Then the plaintiff in this case is *referred by his attorney to a doctor in New Orleans,* Louisiana, who then examines him, and, in essence, as I appreciate his testimony, he found nothing neurologically wrong with this man. . . . Based on that *limited examination,* he then concluded that in his opinion, on that *limited examination* he did not think the man should make a return to heavy manual labor. . . . Dr. Cobb said — and I am not a doctor — the best, most logical person that we have to look in cases of this nature is the *treating physician.* He is the one that lives with, talks to and examines over an entire course period of time the patient to determine what is the nature of his condition. And of course this doctor would have been Dr. Leonard in this case. (Emphasis Supplied)

Just as defendant's tactical position was greatly enhanced by plaintiff's inability to put on opposing medical evidence, so was plaintiff's tactical ability to

promote its position proportionately lessened by the Court's ruling. The ruling had the effect of denying him two great tactical advantages: The first was leeway to more forcefully attack the credibility of Dr. Leonard upon cross-examination. Plaintiff is quite confident that defendant would not have produced a doctor to corroborate Dr. Leonard in this trial. Plaintiff's confidence is corroborated by the fact that the defendant did not call another orthopedic surgeon which he would have been allowed to under the Court's ruling. Secondly, it would have been the unanimous testimony of Dr. Phillips, Dr. Cobb, and Dr. LaRocca that there is no authority in medical literature or in anyone's experience for the proposition that trauma cannot aggravate an existing spondylolysis. Dr. Leonard, was, by his written reports to the defendant's insurer, locked into the position that:

1) Daniel Stelly had spondylolysis;

2) Daniel Stelly had severe trauma to the precise area of his back where the spondylolysis was located;

3) Daniel stelly had no pain whatsoever prior to his injury;

4) Daniel Stelly had severe pain in the area of the spondylolysis immediately upon and continuously following his treatment through the one and one-half year period he was under Dr. Leonard's treatment;

5) He believed Daniel Stelly was sincere in his complaints of pain.

On these same facts, all of the other physicians were unanimous in concluding that Mr. Stelly's pre-existing condition had been aggravated and he was disabled. In order to conclude that Mr. Stelly was not disabled, Dr. Leonard had first to conclude that the pain which Mr. Stelly was experiencing was not stemming from the spondylolysis, but from some simple bruise or strain. To do this with any semblance of reason, he had to take the position, seen in his testimony at page 731, that trauma does not aggravate a pre-existing spondylolysis. That testimony was as follows:

> "Q. Alright. But is there validity to the theory that if a man has a defect and receives significant trauma, that the defect can be aggravated and that pain will occur where it would not have occurred before the trauma, and that the employee will have difficulty getting back to where he was before?
>
> A. I think there is a feeling that way, I personally don't feel . . ."

All three of the doctors that plaintiff intended to call agree that they know of no support either in their own experience or in the experiences of others or as reflected in medical literature for the opinion that trauma cannot aggravate a pre-existing but asymptomatic spondylolysis. Thus, in summary, the prejudice to plaintiff, which would have been great had the

opinion of Dr. Leonard been based upon sound medical principles simply because he was the treating physician, was multiplied because he based his opinion upon a premise unknown to medical science in which he, and he alone, espoused. Because of his status as treating physician, it would have been difficult to impeach him even with the counter testimony of three physicians. Under the limitations of the Court's ruling, the burden was impossible.

The Court's ruling, under this background, was certainly an abuse of discretion and certainly affected plaintiff's right to a jury trial under the Jones Act (46 USCA 688). Rule 403 gave a Court power to limit relevant evidence under very limited conditions. Relevant evidence may only be excluded after counter-balancing "probative value" against (1) the danger of unfair prejudices, (2) confusion of the issues, (3) misleading the jury, and (4) undue delay, waste of time, or needlessly preventing cumulative evidence.

Certainly there is no question as to the relevancy of the proffered testimony. On analyzing the grounds in Rule 403, the only possible reason for the ruling would be "undue delay, waste of time, or needlessly presenting cumulative evidence". It is clear that the evidence proffered here does not fit any of these. It simply cannot be said in reason that in producing three orthopedic surgeons all of whom had examined plaintiff and who concurred in opinions of total and permanent disability as against plaintiff's treating physician who testified

that there was absolutely no disability would have been needlessly presenting cumulative evidence.

Rule 403 is discussed generally in *Weinstein's Evidence.* The following excerpts are pertinent here:

At page 403-7 the treatise states:

> *"Since the trial judge is granted such a powerful tool by Rule 403, he must take special care to use it sparingly.* The tryer must rely primarily on the lawyer for decisions of what evidence will be useful. *Except in rare situations, the good sense of lawyers and jurors and the tactical dangers of overreaching provide sufficient assurance that offered relevant evidence will be helpful.* If there is doubt about the existence of unfair prejudice, confusion of issues, misleading, undue delay, or waste of time, *it is generally better practice to admit the evidence* taking necessary precautions by way of contemporaneous instructions to the jury followed by additional admonition in the charge."
> (Emphasis Supplied)

At page 403-14 the treatise goes on to state:

> "Despite the large powers granted by the rule, the history of opposition to the Model Code of Uniform Rules, as well as the concern of the draftsman of the Federal Rules of Evidence, suggest that Rule 403 should be applied infrequently and cautiously by trial judges."

And at page 403-18, the treatise states:

> "The usual approach on the question of admissibility on appeal is to view both probative force and prejudice most favorably toward the proponent, that is to say to give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value. The trial court will lean toward this approach since the thrust of the federal rules favors admissibility."

Rule 403 was not meant as a device in which a trial court could effect the weight of evidence. This is shown in the case of *United States v. McRae*, 593 F.2d 700 (5th Circuit, 1979):

> *"Unless trials are to be conducted as scenarios, on unreal facts tailored and sanitized for the occasion, the application of Rule 403 must be cautious and sparing.* Its major function is limited to excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect. As to such, Rule 403 is meant to relax the iron rule of relevance, to permit the trial judge to preserve the fairness of the proceedings by exclusion despite its relevance. *It is not designed to permit the court to 'even out' the weight of the evidence,* to mitigate a crime, *or to make a contest where there is little or none."* Ibid. at page 707. (Emphasis Supplied)

The Court's ruling did effect the weight of the evidence. It did serve to "even out" the weight of the evidence. It did make a contest as to matters of whether a pre-existing spondylolysis could be aggravated by trauma where in fact there is little or no contest as to that fact. The Trial Court's actions lost sight of the liberal nature of the Federal Rules of Evidence which favor admission of evidence rather than exclusion. The result was that plaintiff was prevented from presenting its case in the full and complete manner contemplated by the Federal Rules of Evidence. *Young v. Illinois Central Gulf Railroad Company*, 618 F.2d 332, 337 (5th Circuit, 1980).

CONCLUSION

Plaintiff asks the Court to recognize that abuses of discretion by the Trial Court in this matter effectively prejudiced plaintiff and denied him his right to a jury trial under the Jones Act.

Respectfully submitted,

RICHARD J. PUTNAM, JR.
P.O. Drawer 459
Abbeville, Louisiana 70510
(318) 893-0076
Attorney of Record
for Petitioner

WILLIAM J. BURRIS
P.O. Box 2105
Lafayette, Louisiana 70502
(318) 232-6151
Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals have been served on Mr. Patrick Juneau, P.O. Box 3527, Lafayette, Louisiana 70502, by depositing in the United States Mail, postage pre-paid, on this the ____ day of April, 1981.

I further certify that all parties required to be served have been served.

RICHARD J. PUTNAM, JR.
Attorney of Record

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
(Unit A)

No. 80-3016

DANIEL RAY STELLY,
Plaintiff-Appellant,

versus

ATLANTIC PACIFIC MARINE CORP.,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of Louisiana

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(January 30, 1981)

Before Coleman, Chief Judge, Wisdom and Randall, Circuit Judges.

PER CURIAM:

AFFIRMED. See Local Rule 21.[1]

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1 *See N.L.R.B. v. Amalgamated Clothing Workers of America*, 1970, 430 F.2d 966.

I concur.

JMW
CWR
JPC

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
OPELOUSAS DIVISION

DANIEL RAY STELLY

versus CA No. 78-1018

ATLANTIC PACIFIC MARINE CORP.

JUDGMENT

This case came on for trial before this Court on November 5, 1979. Defendant's liability was stipulated and the jury decided only the question of damages. It returned its verdict on November 6, 1979, and on the basis of that verdict:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of DANIEL RAY STELLY and against ATLANTIC PACIFIC MARINE

CORP., in the full and true sum of TWENTY-SEVEN THOUSAND AND NO/100 ($27,000.00) DOLLARS, with legal interest thereon from November 6, 1979, until paid, and for all costs of these proceedings.

JUDGMENT RENDERED AND SIGNED on this 30th day of November, 1979.

/s/ JOHN SHAW
JOHN SHAW
United States District Judge

APPROVED AS TO FORM:

/s/ RICHARD J. PUTNAM, JR.
RICHARD J. PUTNAM, JR.
Attorney for Plaintiff

PATRICK A. JUNEAU,JR.
Attorney for Defendant

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

DANIEL RAY STELLY

versus CA No. 78-1018

ATLANTIC PACIFIC MARINE CORPORATION

MINUTE ENTRY

I acknowledge ruling at the pretrial conference on October 11, 1979, that plaintiff was limited to one additional medical witness who could give opinions based on existing medical records and reports. I have no practice of limiting each side to one medical witness. The reasons for my ruling follow:

I understood that there was no significant dispute between the medical witnesses as to the nature of plaintiff's medical problem or the extent of his disability from this malady.

The controversy centered around whether trauma caused the condition.

Because the trial was set for November 5, 1979, I was dubious that enough time remained before trial for both plaintiff and defendant to secure examinations by orthopedic specialists. Since the plaintiff's physical condition was not in serious dispute, I permitted an additional witness on the question at issue, i.e. causation.

Lafayette, Louisiana, this 13th day of December, 1979.

/s/ W. EUGENE DAVIS
Judge,
United States District Court

Copy sent, 12-14
By: JP
To: Hartman, Putnam, Juneau

(Filed December 14, 1979)